In the

Supreme Court of the United States

October Term 1934.

No. 214

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION,

Respondent,

vs.

ERNEST R. FORREST,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

JAMES F. PIERCE,
CLAUDE F. BAKER,
Attorneys for Petitioner.

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Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Ernest R. Forrest, petitioner, complains of a decree of the United States Circuit Court of Appeals for the Tenth Circuit, made final in that Court on June 7, 1934, (unreported. R. 48, 59), and respectfully petitions for a writ of Certiorari to review the same.

In this behalf your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondent, on November 9, 1932, in his capacity as receiver of a national bank, filed action at law seeking recovery from petitioner of six hundred dollars and interest (R. 3, 9). The cause was tried to the court, a jury having been waived (R. 15). Judgment was rendered for petition-

er (R. 16), and respondent appealed from the Utah Federal District Court to the Tenth Circuit Court of Appeals (R 42, 43).

By his action, respondent sought to recover a personal judgment against petitioner based on an assessment of $600.00 made by the Comptroller on six shares of the capital stock of the Nephi National Bank of Nephi, Utah, (R.7). Certificates for the six shares were issued to Henry Forrest on May 8, 1907, and have remained in his name ever since. He died testate on August 17, 1917, and on March 9, 1918, his son, petitioner here, was appointed administrator of his estate with will annexed (R. 3). The administrator made final settlement of the estate in Probate Court in March, 1920, and on the 11th day of that month the court entered an order approving his acts, closing the estate and directing him to turn over to Rhoda Forrest, widow of the decedent, all the property in his hands, specifically naming it including the six shares of bank stock, which the administrator shortly complied with. (R. 25, 29).

The bank suspended business on December 1, 1931. The Comptroller by his order found the bank to be insolvent on January 26, 1932, and appointed a receiver on that day. By his order he assessed all of its stock 100 per cent on March 8, 1932, payable April 15, 1932. (R. 8, 9).

The decedent bequeathed $1000.00 to a niece and devised all the remainder of his property to his wife for her sole use and benefit during her life; and in event his wife left any property at time of her death, then such property was devised and bequeathed to petitioner and his sister equally. (R. 5).

Henry Forrest's estate consisted of real and personal property of an approximate value of $10,000.00 over and above all debts and costs of administration. (R. 20).

Rhoda Forrest died in July, 1931, and after her death

petitioner next saw the stock certificate in a small box which she kept at her home. That was eleven years after all the property had been delivered to her under the order of distribution. Defendant delivered the stock to the bank and on November 18, 1931, the bank issued its receipt (R. 33), filed that day in the probate court to the effect that the bank held the stock certificates in trust for the Estate of Rhoda Forrest, Deceased. (R. 18).

Some time prior to the decree of distribution in the Henry Forrest Estate, petitioner and his sister transferred their rights as remainder men to their mother, Rhoda Forrest (R. 19). About a month after the decree of distribution, early in 1920, Rhoda Forrest conveyed by separate deeds to petitioner and his sister certain lands formerly in the Henry Forrest Estate. (R. 35, 41).

The case was brought and tried at law seeking recovery from petitioner personally of the assessment amount on the theory that the facts constituted devastavit (R. 1, 9) The case was defended on the issues as made and not upon the equitable issues to impress the property deeded petitioner with any lien (R. 10, 13). Indeed, the other parties, presently interested in the realty, were not before the court, and equitable defenses, or proof thereof, were necessarily not competent, relevant, or material to the aforesaid issues made and tried. At close of trial, after the parties had rested, respondent in his motion for judgment included a request that the cause be transferred to equity, and petitioner's property be impressed with a lien. The trial court denied this motion (R. 24).

The appeal decision, unreported as yet, was by a divided court, Judge Lewis dissenting. The decision held that the facts, although insufficient to constitute devastavit, were sufficient to impress with a lien petitioner's property deeded him by his mother in 1920; that the judgment of the lower court should be reversed, the cause transferred to

equity, and remanded to enter a decree. (R. 48, 59).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits that the present case is one in which this Court should issue a writ of certiorari for the following reasons:

1. Public policy and the public welfare require that secret liens affecting realty titles established and relied upon for over a decade, should be unfavorably regarded. The possibility of such liens springing into existence years afterwards is to detract from realty values, to detriment trade, and to add uncertainty to that which public policy demands should be certain: such as titles to homes, etc. The policy of the common law, based on immemorial experience, was to "discountenance secret liens inasmuch as they hinder trade and restrict the safe and speedy transfer of property" (R. 57). Surely the policy of our law in modern development, is to simplify realty transactions and to promote confidence through certainty. In the case at bar no liability existed prior to a finding of insolvency and assessment made by the Comptroller. The liability is statutory and dates from the Comptroller's order (R. 55,56). The decision here complained of impresses an equitable lien on realty which has been clear and secure in the hands of a distributee's grantee for more than eleven years. This lien is impressed in a law action, tried on tortious issues, where no res of the estate has been in existence or possession of the administrator in over eleven years, and despite a definite holding that petitioner's conduct does not constitute a devastavit.

2. It is believed that the decision in effect tends to impair the full force and effect of Section 102-9-28 Revised Statutes of Utah 1933 (then in effect as Section 7673 of the Compiled Laws of 1917) which provides in part:

> "When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees to contribute to the payment of his claim..."

in that the decision permits respondent, where no res of the estate has existed in eleven years, and the order provided by the above statute has been entered and unquestioned more than eleven years, to impress realty in the hands of the grantee of a distributee with a creditor's claim nonexistent for eleven years after the grant and probate order.

3. It is believed that the effect of the decision is materially to conflict with other federal decisions, to-wit: Hodges v. Meriwether, 55 Fed. (2) 29, 31, which says "But no lien, equitable or otherwise, attached to the property while it was property of the estate, and it passed to her clear of any such lien" (R. 56, 57); Zimmerman v. Carpenter, 84 Fed. (2) 747, (R. 56) in which it was said "If no liability on the stock arises until after the estate is fully distributed then there would be no estate to be charged"; and Matteson v. Dent, 176 U. S. 521 (R. 58), in which it was said at pages 529, 530: "Whether the effect of the allotment (distribution of the estate) was to extinguish the estate was wholly dependent on Minnesota law."

4. It is believed the decision in effect deprives petitioner of his day in court upon equitable issues not tried by the court below. Because respondent erred in presenting his case at law instead of in equity, petitioner is deprived of a substantial right to present his evidence upon issues assumed by the decision and never fully presented to, or tried by the trial court.

WHEREFORE, your Petitioner prays that a Writ of Certiorari be issued out of, and under the seal of, the Honorable Court directed to the United States Circuit Court of

Appeals for the Tenth Circuit, commanding that Court to certify, and to send to, this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 944, Arch R. Jack, as Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, Appellant, vs. Ernest R. Forrest, Appellee, and that the said decree of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray.

ERNEST R. FORREST, by

JAMES F. PIERCE,

CLAUDE F. BAKER, of Counsel,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term 1934.

No.....

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION,

Respondent,

vs.

ERNEST R. FORREST,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIONARI.

I.

THE OPINION OF THE COURT BELOW

The opinion in the Circuit Court of Appeals for the Tenth Circuit is unreported. It appears in the Record at pages 48 to 54. The dissenting opinion by Judge Lewis appears in the record at pages 54 to 59, and is adopted as a complete brief for petitioner's position.

II.

JURISDICTION.

1. The date of the decree to be reviewed is June 7, 1934, (R. 59, 60).

2. This cause was filed originally in the District Court of the United States in and for the District of Utah by respondent, as receiver of a national bank, seeking recovery

from petitioner of an assessment on six shares of national bank stock. The Circuit Court of Appeals, by divided court, reversed the judgment in favor of petitioner, and transferred the cause of equity, remanding same with directions to enter a decree impressing petitioner's lands with the amount of the assessment. (R.54).

Your petitioner claimed that since the cause was an action to hold petitioner liable for devastavit, no equitable decree could be entered. The Circuit Court of Appeals found and held there was no devastavit (R. 52, 53). Petitioner further claimed that in any event no lien existed against the realty of petitioner, deeded him by his mother, distributee of the Henry Forrest Estate. The judgment of the Tenth Circuit Court of Appeals was that petitioner was not personally liable but that petitioner's realty is impressed with a lien in the amount of the assessment (R. 59, 60).

3. This application for a Writ of Certiorari is made under Sec. 240 of the Judicial Code (U. S. C. Tit. 28, Sec. 347).

III.

STATEMENT OF THE CASE.

A full statement of the case has been made in the Petition for Certiorari and in the interest of brevity we refer now to the essential points, namely: The Circuit Court of Appeals held that petitioner was not personally liable (R. 52, 53), but that his realty, received as a grantee of the distributee of the Henry Forrest Estate, is impressed with a lien for the assessment on national bank stock in the name of Henry Forrest, although all assets of the estate were distributed by probate order more than eleven years prior to the assessment order, and petitioner received and recorded his deed more than eleven years prior to the order. (R. 48, 54).

The cause was brought and tried on issues in a law

case, and same was not tried on equitable issues. (R. 1, 15).

IV.

SPECIFICATION OF ERRORS.

1. The court erred in finding and holding that the judgment of the lower court should be reversed, the case transferred to equity and remanded with directions to impress a lien upon petitioner's realty, and awarding a cost judgment against petitioner.

2. The court erred in holding and finding that the decree of the lower court should not be affirmed, and should be reversed.

3. The court erred in finding and holding that respondent's remedy was to proceed appropriately in equity to impress the realty of petitioner with a lien and to enforce it.

4. The court erred in finding and holding that with respect to equitable issues "the facts were alleged in detail, and the case tried fully" (R. 53).

5. The court erred in holding that the assessment liability constituted a lien, equitable or otherwise.

V.

ARGUMENT.

Point A.

The assessment liability constituted no lien, equitable or otherwise, under the facts of the case.

The stock was in the name of Henry Forrest, Deceased. His estate was distributed by order of the Utah probate court more than eleven years before the Comptroller's assessment. The liability for this assessment is statutory, and it does not exist until a finding of insolvency and an assessment made by the Comptroller.

The Dissenting Opinion (R. 55, 56).
McClaine v. Rankin, 197 U. S. 154.

McDonald v. Thompson, 184 U. S. 71.
Christopher v. Norwell, 201 U. S. 216, 225.
Page v. Jones, 7 Fed. (2d) 541, 544.
Rankin v. Barton, 199 U. S. 228, 232.

Under Utah law (Section 102-9-28 Revised Statutes of Utah, 1933, formerly Section 7673 of the Compiled Laws of Utah 1917) in an estate where an order for debt payment and distribution has been made, no creditor can call upon other creditors, heirs, devisees or legatees. (R. 58). Such an order was more than eleven years old in the Henry Forrest Estate before the liability came into existence. There was no res to which a lien could have attached. Where section 66 of 12 U. S. Code has application there can be no lien because the property against which a lien is to be asserted is in the custody of another court, to-wit: the state probate court. The probate court having acted and distributed the assets of the estate lawfully, there is no res left upon which an assessment lien can be asserted eleven years afterwards. Judge Carland, in construing Section 66, in Zimmerman v. Carpenter, 84 Fed. (2) 747, 751, makes this statement: "If no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." (R. 58).

Point B.

The lien should not be asserted against property in the hands of a grantee of the distributee of the Henry Forrest Estate.

Petitioner held his property by promptly recorded grant from the distributee after the decree of debt payments and distribution had been formally entered in the probate court. It is respectfully submitted that cases which permit the following of assets in the hands of heirs are without application to this situation; and where such equitable proceeding is permitted, there are state statute specifically authorizing it, such as the Minnesota statute in the

case of Matteson v. Dent, 176 U. S. 521, which is directly opposed to the Utah statute supra, and to Utah law. There was no estate in petitioner's hands for eleven years when the assessment was made. Petitioner had fully and lawfully performed his duties as administrator with will annexed specifically as commanded by court order. Cases coming within the scope of Section 66 of 12 U. S. Code are those where a stockholder died prior to insolvency and the making of the assessment and when the estate was not fully administered. (R. 56). The assets remaining unadministered were made subject to the assessment. (R. 56) Zimmerman v. Carpenter, 84 Fed. (2) 747; Luce v. Thompson 36 Fed. (2) 183. In Hodges v. Meriwether, 55 Fed. (2) 29, 31, the court said: "But no lien, equitable or otherwise, attached to this property while it was the property of the estate and it passed to her clear of any such lien." (R. 56, 57).

Point C.

The case should not have been remanded to the equity side and a decree entered.

It is respectfully submitted that petitioner was without opportunity at trial to present defense upon the different issues assumed.

The decision says (R. 53) "The facts were alleged in detail and the case tried fully." It is submitted that the case was fully tried only upon the devastavit issues. Equitable defenses, and the proof of equitable issues, were not before the trial court. True it is that the second amended complaint alleged that petitioner surrendered his interests as remainderman in certain specific property in consideration of his mother receiving title by distribution and later deeding the tracts to him. (R. 5, 6). The receiver's proof failed on this issue and the specific proof is to the contrary (R. 19). This is the only issue made with respect to this specific property. The consideration petitioner paid later to his mother in taking care of her in enfeebled and blinded

conditions for eleven years was not before the court or in any way connected with the issues tried. Under the issues as existed, it was not competent, relevant or material to establish the fact that Rhoda Forrest's estate was insufficient in any part to respond to the assessment. It is submitted that the receiver's error, if any, in bringing a law action instead of an equitable suit, has directly benefitted him to the extent that it misled the lower court in trying a different case and petitioner in presenting only defenses at law. The decision, as did the lower court, finds that petitioner is not liable in devastavit which is the only case ever tried (R. 52, 53). It is respectfully submitted that the equitable case, to determine the lien found by the decision of the Circuit Court of Appeals has never been tried. All necessary parties have not been before any court.

The Writ of Certiorari should be issued.

Respectfully submitted,

JAMES F. PIERCE,

CLAUDE F. BAKER, of Counsel,

Attorneys for Petitioner.

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None.

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SUPPLEMENTAL BRIEF

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IN THE

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OCTOBER TERM, 1934.

No. 214.

ERNEST R. FORREST, *Petitioner,*

vs.

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION, *Respondent.*

SUPPLEMENTAL BRIEF FOR PETITIONER.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

To avoid repetition, and in the interest of brevity, this brief supplements the brief heretofore filed in support of petition for writ of certiorari.

The opinion of the court below is now reported in 71 Fed. (2) 264.

The argument is divided in two parts, as follows:

1. The case should not have been remanded to equity, a decree entered, and a cost judgment entered against petitioner personally.

2. The stock assessment established no lien against the realty. First, no lien should be asserted against the realty; and, second, the stock assessment gave rise to no lien.

These matters of argument will be considered in order.

THE CASE SHOULD NOT HAVE BEEN REMANDED TO EQUITY, A DECREE ENTERED, AND A COST JUDGMENT ENTERED AGAINST PETITIONER PERSONALLY.

The case was instituted as a law action and was tried as such on issues of law. The cause as presented to, and tried by the trial court, proceeded on the theory that petitioner was personally liable in damages for devastavit. The majority opinion of the court below recites:

> "Defendant never owned the stock. It was never registered in his name. Distribution of the assets in obedience to an order of the court having jurisdiction of the estate and without fraud was not enough to constitute devastavit creating personal liability on his part. It is our conclusion, therefore, that he is not personally liable, but the property acquired from his mother, formerly a part of the estate, is subject to the obligation since its acquisition was effected without consideration and with knowledge of the undischarged liability."

Therefore the law issues, tried below, were decided in petitioner's favor by the above opinion. The conclusion that petitioner "is not personally liable" seems to require that petitioner should not be held personally liable for the cost judgment entered against him personally below.

But the majority opinion decides the cause on equitable issues, stating that "The facts were alleged in detail and the case tried fully". It is submitted that the equity issues were not properly pleaded or submitted to the trial court since equitable defenses would not have been competent or allowed in the law action tried. It is further sub-

mitted that to impress realty with a lien in a law action where petitioner is unable under ordinary rules of pleading to present his defenses fully is to deprive petitioner of his day in court. The cause as tried below, considered as a suit to determine a lien affecting title to realty is fatally defective since it does not appear in the second amended complaint that all parties actually interested in such title were before the trial court. In reality many parties with rights in such title existed and should have been made parties defendant to the suit. In 20 R. C. L. 704, it is said:

> "The general rule in equity as to parties defendant is that if all persons whose interests will be affected by decree sought to be obtained, that is, all necessary parties, cannot be reached by process, do not voluntarily appear, or from a jurisdictional objection going to the persons in the courts of the United States cannot be made parties, the bill must be dismissed. If the interests of those present and those absent are inseparable, the obstacle is insuperable." (The footnotes cite numerous U. S. Supreme Court decisions.)

The majority decision below states petitioner acquired the property without consideration. The issue of consideration, while not relevant to the issues of law joined, nevertheless was briefly covered by proof. The only competent evidence in the case is as follows:

Tr. Record Circuit Ct. Appeals, page 20:

> Q. You gave nothing for it; you received it as a gift, you say, from your mother?
>
> A. No cash consideration, no.
>
> Q. Nor any other consideration excepting your assignment to your mother?
>
> A. That I was to take care of her for the rest of her life.

The record shows that petitioner's mother died in July, 1931, and the transfers were made to petitioner by his mother in early 1920. It would seem that petitioner paid a high consideration for the property through taking care

of his mother for over eleven years. At least the state of the proof hardly justifies the statement in the opinion below that "its acquisition was effected without consideration and with knowledge of the undischarged liability". It is respectfully submitted that to impress a first and prior lien against the realty is to impair substantial property rights without due process of law. The error in presenting a law action to the trial court was made by the receiver, and such error is not properly charged to the trial court or usable as a basis to penalize petitioner.

It is believed, therefore, that the equitable cause determined by the court below was not properly presented to the trial court; that petitioner has never had opportunity to present his equitable defenses and relevant testimony; that the necessary parties were never before any court; that the only cause tried was affirmed by the court below; and that if petitioner is not personally liable under the issues tried, a cost judgment should not be entered against him.

(Point C of Petitioner's Brief, pages 11-12.)

PART II.

THE STOCK ASSESSMENT ESTABLISHED NO LIEN AGAINST THE REALTY. FIRST, NO LIEN SHOULD BE ASSERTED AGAINST THE REALTY; AND, SECOND, THE STOCK ASSESSMENT GAVE RISE TO NO LIEN.

The argument here is thoroughly covered by the dissenting opinion of Judge Lewis in 71 Fed. (2) 264, this cause below.

Points A and B, pages 9-11 of the Petitioner's Brief filed herein are further referred to.

As pointed out in the dissenting opinion, and the authorities therein cited, and those cited on pages 9-10 of Petitioner's Brief, the liability for the assessment is statutory, and does not exist until a finding of insolvency and an assess-

ment made by the Comptroller. Therefore, any lien which could have resulted from the assessment was not called into existence prior to 1932.

When petitioner's father died in 1917 his will made petitioner's mother sole beneficiary with exception of a $1000.00 bequest to a niece and a provision to divide any propery remaining on death of petitioner's mother between petitioner and his sister. Petitioner was appointed with will annexed of his father's estate in 1918, and in 1920 the probate court approved his acts, and distributed the complete remaining property of the estate, including six shares of the bank stock, to petitioner's mother. The distribution was made by the probate court as directed by the will. Some time prior thereto, petitioner and his sister surrendered their uncertain rights under the will to their mother. No claim for bank stock assessment existed at the time, and there was no way under any theory of law that petitioner could have prevented the distribution. There was no unpaid estate claim or liability. The majority opinion below states:

> "Distribution of the assets in obedience to an order of the court having jurisdiction of the estate and without fraud was not enough to constitute devastavit creating personal liability on his part."

It seems to be a conceded point in the case that there was no lawful duty unperformed by petitioner or maladministration of his father's estate.

It might be well to consider if a lien for a 1932 stock assessment liability could have attached to any assets of the estate during administration. These assets were in the exclusive and lawful custody of the state probate court. The last paragraph of the dissenting opinion says:

> "There is another matter. Where section 66, supra, applies no lien can be adjudged by a court out of possession against property in the exclusive and lawful custody of a court of another jurisdiction, and no final

> judgment can be entered by such a court that would authorize the levy of an execution upon it, because it is already in custodia legis. The only remedy that can be afforded by a court to enforce an assessment under the conditions set up in said section 66 is to allow the claim and provide that it be satisfied out of the property in the hands of the administrator. This is clearly pointed out by Judge Shiras in Wickham v. Hull, 60 Fed. 327."

It follows now that if petitioner's mother took the distributed assets clear of lien, the assets, if they ever became subject to lien, must have become so in her possession or in the possession of her grantee. It will be remembered that petitioner's mother deeded to petitioner a part of the real assets about a month after distribution, the bank stock remaining in the mother's possession.

Section 102 9 28 Revised Statutes Utah 1933 (then in effect as Section 7673 of the Compiled Laws of Utah 1917) provides:

> "When the accounts of the administrator or executor have been settled, and an order made for the payment of the debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees to contribute to the payment of his claim * * *."

If this section be given full effect it would require a holding that the receiver whose 1932 claim was not included in the probate order for payment in 1920, has no right after the distribution to call upon heirs, devisees or legatees to contribute to the payment of his claim. Certainly it would appear he is without right to call upon a grantee of a distributee where the grant is twelve years old.

It is believed that the lien could not have attached to the assets during the month same were owned by petitioner's mother, and after her grant to petitioner, same were free of any claim of lien.

The Utah statute if given its plain effect clearly distinguishes this case from Matteson v. Dent, 176 U. S. 521, quoted from in the decision below. Matteson v. Dent turns on the effect of a Minnesota statute which provides that an estate creditor may recover from next of kin sufficient of the distributive shares to satisfy the debt. The Utah law closes the matter finally unless the creditor's claim was included in the probate order for payment of debts, and should be given effect according to its intent the same as was the Minnesota statute in the case of Matteson v. Dent.

It is believed, in any event, that no lien arose through the stock liability. In the dissenting opinion it is said:

> "No lien is given by statute, although the liability is fixed by statute. The lien is said to be equitable. In Hodges v. Meriwether, 55 F. (2) 29, 31, a like contention was made by the receiver. In response thereto the court said: 'But no lien, equitable or otherwise attached to this property while it was the property of the estate and it passed to her clear of any such lien.'" Zimmerman v. Carpenter, supra, cited to sustain a contrary conclusion in Drain v. Slough, 61 F. (2) 668, does not support that view. The statement in Mann v. Kleisdorff, 16 F. (2) 997, 998, that in event an assessment is made after the running of the local statute of limitations the receiver could pursue his remedy against funds of the decedent 'into whosoever hands they might have come' is obiter. Moreover, it does not appear that there were no funds of the estate in the hands of the executrix at the time the assessment was made, as here. There were no liens, at common law without possession by the one claiming the lien. 'Its policy was to discountenance secret liens inasmuch as they hinder trade and restrict the safe and speedy transfer of property.' It is true that the creditors of a bank, whom the receiver here represents, had an equitable lien on the capital stock of the bank,—the funds paid in or to be paid in on subscription therefor, and those to be paid on assessment; but it certainly cannot be that such a lien extends to all of the other property of each stockholder.

Pomeroy's Equity Jurisprudence, Section 1234, is in part this:

> 'The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with, or in some manner relate to, specific property, such as a tract of land, particular chattels, or securities, a certain fund, and the like.'

I find no authority sustaining the proposition that creditors of the corporation have an equitable lien on property of the stockholders aside from his interest in its capital stock. That lien, as pointed out by Cook on Corporations and other text writers, may be created by statute, by charter, or possibly by by-law or contract. There being no property or funds belonging to the estate of Henry Forrest in the hands of appellee as administrator at the time liability for the assessment arose and the cause of action accrued, nor for more than eleven years prior thereto, there was no res to which the asserted lien could attach nor assets of the estate to be followed into the hands of the distributees * * *."

CONCLUSION.

Petitioner submits that the cause was tried at law and not in equity for devastavit by maladministration. In developing the action it was alleged that certain assets were mismanaged, tracing them into the hands of petitioner by grant from the estate distributee. The proof of the receiver failed on this theory utterly. The opinion below absolves petitioner of devastavit. This was the only case tried. The opinion below says that a stock liability arising about twelve years after the estate distribution was completed, claims paid, and the property deeded to petitioner by the distributee, constitutes an equitable lien against the property. It is submitted that not only is there no equitable lien arising, but such lien could not be impressed on property secured in the hands of a distributee's grantee, and undisturbed for approximately twelve years. So to

impress it is to disregard the present state of title and the claims of persons not before the court; to derogate from the plain intent of Utah statute and law, and to substitute therefor the effect of a contrary Minnesota statute; to countenance secret liens which hinder trade and restrict the safe and speedy transfer of property; and to re-write the statute which provides the bank stock liability by adding thereto lien provisions which make for uncertainty in titles to homes and kindred realty.

Petitioner therefore prays that the decree of the Tenth Circuit Court of appeals be reversed, the judgment of the District Court of the United States for Utah be affirmed with costs; and for such other and further relief as to this Honorable Court may seem meet and just.

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